

IN THE SUPREME COURT
APPEAL FROM THE COURT OF APPEALS

Murphy C.J., Fitzgerald, Borrello, J.J.

DETROIT EDISON COMPANY,

Supreme Court No. 148753

Plaintiff-Appellee,

Court of Appeals No. 309732

Court of Claims No. 10-104-MT

v

DEPARTMENT OF TREASURY,
STATE OF MICHIGAN,

Defendant-Appellant.

AMICUS CURIAE BRIEF OF
THE MICHIGAN CHAMBER OF COMMERCE

MICHIGAN CHAMBER OF COMMERCE

By: James R. Holcomb (P53099)
600 S. Walnut Street
Lansing, Michigan 48933

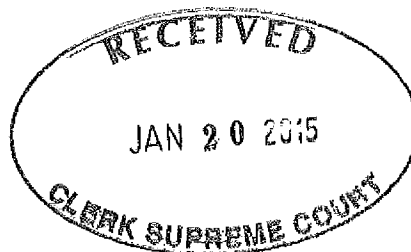


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QUESTIONS PRESENTED

1. Whether the Court of Appeals correctly determined that equipment used by Detroit Edison Company (“DTE”) to process, condition, control and monitor electricity until the electricity has reached the required regulatory parameters to be safely provided to its customers in its final form, performs industrial processing activities that qualify for the industrial processing exemption from Michigan Use Tax, MCL 205.91 *et seq.*?

Plaintiff-Appellee answers, “Yes.”

Defendant-Appellant answers, “No.”

Court of Claims answered, “Yes.”

Court of Appeals answered, “Yes.”

Proposed Amicus Curiae Michigan
Chamber of Commerce answers, “Yes.”

I. STATEMENT OF INTEREST OF AMICUS CURIAE

The Michigan Chamber of Commerce (the “Chamber”) is a nonprofit corporation representing over 6,800 members, all of whom are private enterprises engaged in an array of civic, professional, commercial, industrial, and agricultural activity in Michigan. Since its founding in 1959, the Chamber has sought to engage decision makers at all levels of government with the hope that the continual development of law and public policy will keep Michigan economically competitive and make the State attractive as a place to live and work. With this goal in mind, the Chamber has participated in lawsuits to ensure that courts are aware of how business is conducted in Michigan and are mindful of the impact court decisions have on the business operations and economic development in this State.

Amicus Curiae Michigan Chamber of Commerce is concerned about the effect of the Michigan Department of Treasury’s (the “Department”) proposed systematic imposition of double taxation on Michigan businesses without any legislative authorization. Additionally, Amicus Curiae is concerned about the negative effect of this unsanctioned duplicative taxation on businesses in Michigan. The decision below properly ensures that Michigan businesses and all Michigan residents are only subject to tax once when they purchase the electricity necessary to run their businesses and heat their homes. In contrast, a reversal of the decision below would result in double taxation on purchases of electricity, and improperly increase the cost of doing business, and residing, in Michigan. This would put Michigan at an economic disadvantage in trying to maintain its recovering economy, engage in further economic development and attract new businesses. The Department’s proposed sales and use tax interpretation would result in a tax structure that discourages businesses from locating in Michigan where they will be potentially subject to double taxation. Moreover, the Department’s proposed interpretation of

the sales and use tax statutes will adversely impact all Michigan residents, by increasing the cost of their electricity.

The Department's position that use tax can and should be imposed on the purchase of equipment used to generate, process, condition, control and monitor electricity until the electricity has reached the required regulatory parameters to be safely provided to customers (and thus qualifies for the industrial processing exemption), contradicts the fundamental tax policy to avoid tax pyramiding. The purpose of the industrial processing exemption is to ensure that business inputs used to produce a final product sold at retail are not subject to tax when used by a manufacturer. The Department seeks to tax equipment that is specifically exempted by statute, creating a "new" tax base to impose tax upon, regardless of the imposition of sales tax upon the retail sales of electricity to its customers. This establishes an implicit structure of double taxation on all purchases of electricity within Michigan.

The Department's suggestion that the equipment fails to perform industrial processing activities, or is excluded from the definition of "industrial processing" flies in the face of the statutory scheme as well as the testimony of numerous experts. Moreover, the Department's contention that DTE should pay use tax on its purchases of the equipment, while acknowledging that sales tax is collected from Michigan businesses and residents on the full sales price of the electricity, purposefully turns a blind eye to the duplicative nature of tax pyramiding. It is simply wrong for the Department to attempt to establish a misguided and unauthorized interpretation of the law that inevitably leads to double taxation, particularly without any legislative authorization. Michigan businesses and residents should not be purposefully subjected to double taxation, increasing their costs of living.

The Court of Appeals' decision¹ below properly eliminates the potential for double taxation in accordance with this Court's prior precedent. Additionally, the Department's proposed position imperils the economic vitality of all Michigan businesses, large and small. Michigan business need affordable energy costs in order to compete economically in today's economy. They rely upon the state to ensure access to affordable energy and improve reliability and long-term competitiveness. Amicus Curiae has long advocated for a strong energy policy utilizing a diverse portfolio that balances cost, reliability, efficiency and investing in the future. Amicus Curiae members have relied on Michigan's expanded industrial processing exemption to ensure that processing equipment is exempted from tax when the final retail product produced by the equipment is subject to sales tax. Amicus Curiae have also relied upon Michigan's expanded industrial processing exemption to ensure that businesses are not subject to double taxation when statewide electric rates are established. The Department's recommended overruling of the lower courts decisions is unsupported by law or policy, and would create a new taxing power for the Department to impose tax on industrial processing equipment in Michigan. It exposes Amicus Curiae members large and small to increased energy costs needed to run their businesses. All Michigan residents need financial certainty and reasonable costs of energy.

Amicus Curiae asks this Court to affirm that a full industrial processing exemption applies to the equipment in question, and is necessary to avoid tax pyramiding and continue access to affordable energy in the state. The plain language of the Use Tax Act, MCL 205.91 *et seq.*, and multiple appellate decisions from this Court hold that tax pyramiding is to be avoided. This Court has regularly rejected philosophical, revenue driven agency explanations of statutes and statutory intent for the certainty and constitutionally required limitations found in plain

¹ *Detroit Edison Co v Dep't of Treasury*, 303 Mich App 612; 844 NW2d 198 (2014), App 1b-13b.

statutory language. Amicus Curiae submits that a business environment which lacks court oversight of agency interpretation of statutes imbalances the division of governmental power. The Court of Appeals' decision upholds the industrial processing exemption as acknowledged by the Department and consistently upheld by Michigan courts. Amicus Curiae requests that this Court grant its motion to file briefs in this case and affirm the decision of the Court of Appeals below.

II. STATEMENT OF FACTS

Amicus Curiae relies on the factual background contained in Plaintiff-Appellee's Brief.

III. STANDARD OF REVIEW.

This Court reviews de novo the Court of Appeals' affirmance of the Court of Claims' grant of summary disposition. *Greene v AP Products, Ltd*, 475 Mich 502, 507; 717 NW2d 855 (2006).

Tax statutes are strictly construed, but when the Department seeks an expansion of its taxing authority, tax statutes are narrowly construed in favor of taxpayers. *In re Dodge Bros*, 241 Mich 665, 669; 217 NW 777 (1928). To preserve the separation of powers provided in the Michigan Constitution, the Department of Treasury's interpretation of a statute is subject to de novo review. *In re Complaint of Rovas Against SBC Michigan*, 482 Mich 90, 102-103; 754 NW2d 259 (2008). The constitutionally required standard of review is whether the Department's interpretation conflicts with the statute. *Id.* at 108. When there is no conflict, the Department's interpretation of a statute is entitled to respectful consideration. *Id.* The Department's interpretation cannot conflict with the plain meaning of the statute, and, to ensure that limitation is maintained, the Department's interpretation is not binding on reviewing courts. *Id.*

IV. ARGUMENT

A. Use Tax May Not Be Imposed on Equipment That Qualifies For a Full Industrial Processing Exemption and is Used to Produce a Final Retail Product Subject to Sale Tax, As the Imposition of Use Tax Would Result in Tax Pyramiding.

Statutes must be interpreted to accomplish the intent of the Legislature. *Fradco, Inc. v Dep't of Treasury*, 495 Mich 104, 112; 845 NW2d 81 (2014); *Jennings v Southwood*, 446 Mich 125, 135; 521 NW2d 230 (1994). This Court has held that the Legislative intent of the industrial processing exemption is to prevent tax pyramiding because it is against public interest and should be avoided:

The industrial processing exemption is, in part, the product of a targeted legislative effort to avoid double taxation of the end product offered for retail sale or, in other terms, to avoid 'pyramiding the use and sales tax.' *Pyramiding occurs when both use and sales taxes are imposed on the production and sale of retail goods.* [*Elias Brothers Restaurants, Inc v Dep't of Treasury*, 452 Mich 144, 152; 549 NW2d 837 (1996) emphasis added.]

When a taxpayer purchases inputs to produce a product for sale at retail, if the inputs were subject to sales or use tax and if the final product were subject to sales or use tax, there would be an unlawful pyramiding of taxes. The industrial processing exemption exists in Michigan and many other states that impose sales and use taxes so as to prevent this pyramiding of taxes. As this Court has stated:

If the end product is taxed, the components used or consumed in its production are not taxed so that the product is not subject to double taxation. [*Elias Bros Restaurants*, 452 Mich 144, 152; 549 NW2d 837 (1996), emphasis added.]

The sale of electricity, as well as the sale of transmission and distribution, is subject to sales tax in Michigan. Thus the price charged for electricity reflects the costs incurred to generate, process, condition and monitor the electricity. To impose sales or use tax on the equipment used to process the electricity to meet the regulatory requirements necessary before the final product

can be sold to the customer would result in unlawful double taxation, or “pyramiding of tax.” See also, *Granger Land Development Co v Dep’t of Treasury*, 286 Mich App 601, 608; 780 NW2d 611 (2009); *Gen Motors Corp v Dep’t of Treasury*, 466 Mich 231, 237; 644 NW2d 734 (2002).

B. The Policy Consideration of Electric Affordability Requires the Application of the Industrial Processing Exemption to Equipment That Performs Industrial Processing Activities While Providing Electricity to Michigan Businesses and Residents.

The Department admits that sales of electricity by DTE and the other limited numbers of electric providers in the state are subject to sales tax. Yet, the Department seeks to impose tax again, on the purchases of the equipment used to process the electricity until it reaches the regulatory parameters for a final sale at retail to DTE’s customers. This additional tax would result in an increase in the cost of energy to Michigan businesses and residents. This contradicts the state’s policy to strive for energy affordability with the intent to support Michigan businesses.² Utilities already face significant challenges to maintain electricity rates at levels that Michigan businesses and residents can afford.

Amicus Curie has a strong interest to avoid increases in the cost of energy to Michigan businesses and residents. Michigan’s electric rates are already the highest among our neighboring Midwest states.³ The Department’s attempt to deny the industrial processing

² Energy affordability reached crisis proportions in February of 2010, according to The Heat and Warmth Fund (THAW), a statewide non-profit emergency energy assistance program. A summary of the Michigan Home Energy Affordability Gap can be found at <http://www.prnewswire.com/news-home-energy-crises-54121522>.

³ In the East North Central Division, comprised of Illinois, Indiana, Michigan, Ohio and Wisconsin, Michigan has the highest average retail price of electricity in all end-use customer sectors, which includes residential, commercial, industrial and transportation. See U.S. Energy Information Administration, available at <http://www.eia.gov/electricity/monthly>.

exemption contradicts the state's policy to strive for electric affordability, particularly in light of the current economic condition and the desire to support and grow Michigan businesses. Energy affordability is a key criterion in economic development, for existing Michigan business as well as to attract new businesses to the state.⁴ The residents of Michigan expect DTE to be an efficient energy provider, while striving to the fullest extent possible to keep costs reasonable. In essence, the Department seeks to create an environment where Michigan businesses and residents will pay more for their energy costs and reduce the attractiveness of the state for new business potential.

The customer affordability factor of energy is critical to quality of life in the state. As electric providers strive to modernize our state's electric infrastructure, a reversal of the lower courts' decisions would impose harm to those in the state least able to afford higher electric costs, and create a clear double burden of tax that harms all Michigan businesses and residents.

V. CONCLUSION

Amicus Curiae requests that this Court permit the filing of this brief and hold that, under the clear statutory standard as well as this Court's prior rulings, equipment that performs industrial processing activities throughout the transmission and distribution process prior to the final retail sale to the customer is not subject to use tax. The Department's attempt to prohibit the statutory exemption under an interpretation that contradicts the clear and unambiguous statutory language meant to support Michigan businesses and foster the state's economy, defies logic and cannot be harmonized with the intent of the Legislative and this Court's holdings.

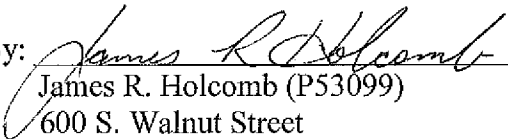
⁴ See Governor's Energy Task Force, <http://www.michigan.gov/engery>.

Respectfully submitted,

MICHIGAN CHAMBER OF COMMERCE

Dated: January 19, 2015

By:


James R. Holcomb (P53099)
600 S. Walnut Street
Lansing, Michigan 48933